SUPREME COURT U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-852

BARRY JABLON,

Petitioner,

v.

TRUSTEES OF THE CALIFORNIA STATE COLLEGES;
GLENN S. DUMKE,
Chancellor of the California State Colleges;
S. I. HAYAKAWA,
President of San Francisco State College,

Respondents.

Brief In Opposition

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INTRODUCTION

There is no need for this Court to review the decision of the Court of Appeals in this case. Contrary to the allegations of the petitioner, the Court of Appeals did not make a "finding" contrary to the evidence. Nor did it rule contrary to the decision of this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972).

In summary, the evidence shows, at the very most, that a nontenured professor who is not rehired by a college will have, in a period of tight employment, a somewhat harder

job of finding a new position than will a person who has not been released by a college. We submit that such a finding does not constitute the "stigma" which this Court held in *Roth* entitled the person to a due process hearing. Moreover, in the present case, petitioner was in fact given a hearing at which he was afforded the opportunity to show why the college's reasons for nonretention should be rejected.

ARGUMENT

I. The Court of Appeals Did Not Disregard Uncontroverted Facts

Petitioner's first argument is that the Court of Appeals disregarded uncontroverted evidence that the State made a "charge" against petitioner which was likely to "seriously damage petitioner's standing and associations in the community." The uncontradicted evidence referred to is the testimony of "three college professors." A reading of that testimony reveals that no such "charge" was made. To the contrary, the evidence shows that petitioner was not retained because he was not deemed to be a good enough overall teacher and scholar to merit retention.

Professor Nierenberg made the conclusionary statement that he thought a "stigma" "attached to an individual who is terminated by his college president under circumstances where the president has said that there is substantial evidence raising doubt as to that individual's fitness to teach." RT 321. When asked to elaborate and explain what he meant, he only stated that "I know of no teacher *we* have hired who has been dismissed by his [president] under the auspices that you explained." RT 322.

The testimony of Professor Solomon is more illuminating. In explaining what he meant by "stigma", he stated

> "The hiring process in this kind of market, those who would hire, are looking for ways of rejecting peo-

> ple. They always have too many applicants for a job. When you come up with a mysterious answer, 'Well, I can't tell you exactly why I was fired, it had something to do'—and then you can't pin it down, the man that doesn't have that in his background gets the job." RT 330.

Professor Cunningham did not even testify directly regarding a "stigma". It was simply stipulated that if asked similar questions she would give similar answers. RT 359-60.

The testimony of the "three college professors" simply does not support the conclusion that the college "seriously damaged" petitioner's "standing and associations in the community." Viewing the evidence as a whole, as did the Court of Appeals, reveals that there is no mystery at all as to why petitioner was not rehired. Petitioner was told, and it was brought out at the grievance hearing, that the reasons behind the President's decision were all related to petitioner's academic performance at the college, namely, certain irregularities in his grading practices, a complete lack of showing of any scholarly pursuits while at the college and a lack of evidence that he was anything but a mediocre classroom teacher.

Petitioner himself testified that the college "wasn't charging me with any unprofessional conduct." RT 210.

Thus, when all the evidence is considered, it is readily apparent that the Court of Appeals did not disregard uncontroverted evidence that the State made a "charge" against petitioner which seriously damaged his standing and associations in the community. To the contrary, the evidence does no more than support the proposition that a non-tenured professor who is not retained because the college does not deem him to be a good enough overall teacher

to merit retention will find it more difficult to find a position than will the teacher who has not been released.[1]

II. The Decision of the Court of Appeals Is Not Contrary to the Decision of This Court in Board of Regents v. Roth, 408 U.S. 564 (1972)

Petitioner's second argument is that the actions of the college labeled petitioner as "incompetent" and that, under *Board of Regents v. Roth,* 408 U.S. 564 (1972), such a charge requires notice and a hearing. We do not believe that this Court did or should so hold.

Initially, we point out the obvious, namely, that nothing the college did branded petitioner as an "incompetent," as that word is generally understood. According to Webster, an "incompetent" is a person lacking in the mental ability to handle his affairs or not meeting the legal qualifications for a job. No such inference could be drawn in this case. To the contrary, the evidence shows that petitioner was not rehired because the college did not deem him to be a good enough overall teacher and scholar to merit retention. That is a far cry from branding him as an "incompetent". This Court has never held that a nontenured professor is entitled to notice and a hearing when he is not rehired because for academic reasons the college does not believe he merits retention.

In *Board of Regents v. Roth,* 408 U.S. 564 (1972), this Court resolved the conflicting lower court decisions that existed at the time the complaint in this action was filed and unequivocally held that procedural due process concepts do not require a college to grant a hearing to a nontenured teacher whose employment is not renewed. In

1. At the trial, petitioner produced no evidence whatsoever as to where he applied for employment *or that any prospective employer even knew of the circumstances surrounding his nonretention.*

Roth, this Court stated a possible exception to the general rule in the following language:

> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' *Wisconsin v. Constantineau,* 400 U.S. 433, 437; *Wieman v. Updegraff,* 344 U.S. 183, 191; *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123; *United States v. Lovett,* 328 U.S. 303, 316-317; *Peters v. Hobby,* 349 U.S. 331, 352 (DOUGLAS, J. concurring). See *Cafeteria Workers v. McElroy,* 367 U.S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's interest in his 'good name, reputation, honor, or integrity' is at stake.
>
> "Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For '[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury . . .' *Joint Anti-Fascist Refugee Committee v. McGrath, supra,* at 185 (Jackson, J., concurring). See *Truax v. Raich,* 239 U.S. 33, 41. The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of oppor-

> tunities 'in a manner . . . that contravene[s] . . . Due Process,' *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238, and, specifically, in a manner that denies the right to a full prior hearing. *Willner v. Committee on Character,* 373 U.S. 96, 103. See *Cafeteria Workers v. McElroy, supra,* at 898. In the present case, however, this principle does not come into play." 408 U.S., 573-4; footnotes omitted.

A careful reading of the quoted language indicates that this Court was not creating a broad, all-encompassing exception. To the contrary, this Court refers to a "charge against him that might *seriously* damage his *standing and associations in his community.*" This Court, in the next sentence, goes on to give two examples of the type of charge it was talking about, namely, a charge "that he had been guilty of dishonesty or, immorality." These are charges which affect the individual's "good name, reputation, honor, or integrity." This Court then referred to the "stigma or other disability that *foreclosed his freedom* to take advantage of other employment opportunities", such as by invoking "any regulations to bar the respondent from all other public employment in state universities." This Court, in footnote 13 on page 574, pointed out that mere proof that his nonretention "might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities" that gave rise to a right to a hearing. Surely, the language of this Court does not imply a broad exception to the general rule.

The cases cited by this Court in *Roth* give further indication of the type of situation to which this Court was referring:

—*Wisconsin v. Constantineau,* 400 U.S. 433 (1971), dealt with the "posting" of an individual's name in all liquor stores, prohibiting the person from buying liquor. This

Court held the "posting" was a "degrading" "official branding".

—*Wieman v. Updegraff*, 344 U.S. 183 (1952), dealt with a loyalty oath that required disclosure of "innocent membership" in organizations deemed subversive. This Court held this involved a "badge of infamy" which in the time of a cold war caused neighbor to view neighbor as an "enemy".

—*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), dealt with the branding of an organization as "communist" by the Attorney General.

—*United States v. Lovett*, 328 U.S. 303 (1946), dealt with an act of Congress which identified three individuals by name, prohibited them from obtaining any government employment except as a juror or soldier, and labeled them as "subversive" and "disloyal".

—*Peters v. Hobby*, 349 U.S. 331 (1955), dealt with a Civil Service Commission Loyalty Review Board determination that there was doubt as to the individual's "loyalty" and which prohibited him from any federal employment for three years.

Following the citation of the above cases, all of which afforded some relief under due process concepts, this Court cited *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961). In that case a cafeteria worker was excluded from her job on a military base because the security officer determined that she did not meet security requirements. This Court held that no hearing was required. This Court indicated that the restriction did not "bestow a badge of disloyalty or infamy", but could just as well mean that the person was "garrulous or careless with her identification badge."

In *Roth*, this Court established a broad, general principle, namely, that the nonretention of a nontenured professor

does not call for a statement of reasons and a hearing. This Court implied a narrow exception where the nonretention was coupled with charges that did serious damage to the good name and reputation of the individual by impugning his honesty, integrity or morality. We do not believe that the narrow exception should be expanded to cover any situation where the college's actions could be construed as a statement that it did not think the individual was a good enough teacher to qualify as a future member of the faculty. To so expand the exception would make the exception the rule and in effect nullify the holding of the case itself. That is so since any lawyer worth his salt could prove such a "stigma" in virtually any case. Any time a professor is not rehired and is replaced with another individual, the college in effect is saying to the terminated person, "You don't measure up to the quality that we want to maintain here at this college." Obviously, that individual will have more trouble, in times of tight employment, of finding employment elsewhere than will the individual who has not been released by a college. We simply cannot believe that this Court intended to rule that procedural due process required a statement of issues and a hearing in a case such as this where no public "charges" of any sort were made and the only questions raised related to the individual's qualifications and practices in the academic area.

In any event, even if petitioner were subjected to a "stigma" to the extent that the college was required by procedural due process concepts to afford him a hearing, the evidence shows that he was afforded such a hearing. It is undisputed—in fact it is alleged in the complaint (paragraph XVIII)—that petitioner was told of the reasons for the decision not to rehire him. Thereafter, he was afforded

a hearing under the university's grievance procedures, which have been held to be "fair and adequate". *Toney v. Reagan,* 467 F.2d 953 (9th Cir. 1972). At the hearing, petitioner offered evidence in an attempt to answer the reasons previously related to him. The Court of Appeals held that the university complied with the grievance procedures in this case. Accordingly, petitioner has received a hearing consistent with procedural due process standards and all the argument about "stigma" is irrelevant.

III. The Court of Appeals Has Not Rendered Inconsistent Opinions

Petitioner contends that the decision of the Court of Appeals in this case is "incomprehensible" in view of the recent decision of the Court of Appeals in *Stewart v. Pearce,* No. 71-1875 (9th Cir.) (Sept. 17, 1973). The contention is unsupportable, for the two cases are not at all analogous.

In *Stewart,* the plaintiff was a classroom teacher. Following his involvement in certain activities, the college transferred him from his classroom teaching duties and assigned him to the library. At the same time, the college ordered him to submit to a psychiatric examination to determine his mental competency. The Court of Appeals held that a "stigma" attached, noting that the "order by the College to report for a psychiatric examination implied that there existed both reasonable grounds for the order and mental unfitness for the job."

On the other hand, in the present case petitioner was not rehired for the academic reasons stated to him, to which he responded at the grievance hearing. There is no similarity whatsoever between this and the *Stewart* decision.

CONCLUSION

The Court of Appeals did not disregard the testimony of "three college professors." To the contrary, the Court of Appeals expressly recognized the point of their testimony. The Court of Appeals correctly concluded that no "stigma" attached to petitioner and that the exception to the general rule of *Roth* did not apply here.

Respectfully submitted,

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